

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 04-227
Competition in the Market for the)	
Delivery of Video Programming)	

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

Marsha J. MacBride
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

August 25, 2004

EXECUTIVE SUMMARY

Comments filed by the Satellite Broadcasting & Communications Association ("SBCA") and EchoStar Communications Corporation ("EchoStar") contain a variety of mistaken factual claims and ill-conceived policy proposals. In these Reply Comments, the National Association of Broadcasters ("NAB") submits the following rejoinder:

- The "digital white area" proposal advanced by the SBCA would have devastating effects on free, local, over-the-air stations in many markets.
- Contrary to their claims about severe capacity constraints, the DBS firms have (and already have plans to rely on) many different methods for substantially increasing their ability to deliver local stations. These methods, such as use of improved (MPEG-4) compression technology and combining Ku-band and Ka-band spectrum, will enable satellite carriers to offer not only universal analog local-to-local but also local digital, high-definition, and multicast signals.
- Television stations' offerings that "bundle" retransmission consent with carriage of nonbroadcast channels, such as a local news channel, are commonplace in many contexts – and enable both broadcasters and multichannel program service providers to achieve the best possible economic outcome.
- The Commission has repeatedly and properly rejected SBCA's hackneyed criticism of the ILLR model, and of the Grade B intensity standard for reception of analog signals. Far from being a "1950's-era" method, the ILLR model was first promulgated by the Commission in 1999, and the Grade B intensity standard has been repeatedly reviewed by the Commission -- and each time determined to be sound.

- Any new authorization to allow DBS firms to carry "significantly-viewed" stations must be carefully crafted to prevent satellite carrier abuse and damage to localism.
- EchoStar's "two dish" major abuse of local into local has been allowed to continue far too long and must be remedied.

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	i
I. The “Digital White Area” Proposal Urged by the SBCA Is Contrary to The Public Interest	1
A. The Broadcast Industry Has Spent Enormous Sums And Dedicated Extraordinary Efforts to Implementing The Transition to Digital Broadcasting – With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households	3
B. The New Digital Distant Compulsory License Proposed By the SBCA Is Unnecessary and Would Do Lasting Damage to Localism	6
II. DBS Claims of Capacity Constraints Are Highly Suspect; Many Options Exist For Expanding The Ability to Deliver Local Signals, Including Local Digital and HD Signals	9
III. The Commission Should Not Bar Offers to “Bundle” Retransmission Consent with Carriage of Nonbroadcast Channels	12
IV. SBCA’s Attack on the Commission’s ILLR Model and on The Grade B Intensity Standard is Without Merit	13
V. Any Application of “Significantly-Viewed” To DBS Must Include Appropriate Safeguards.....	15
1. Strict enforcement provisions to protect against against abuse	16
2. Protection against harm to localism.....	16
VI. EchoStar’s “Two Dish” Major Abuse of Local-To-Local Must Be Remedied.....	18
Conclusion	20

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 04-227
Competition in the Market for the)	
Delivery of Video Programming)	

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")^{1/} hereby submits these Reply Comments in response to the Commission's *Notice of Inquiry* ("Notice") in this proceeding.^{2/}

**I. The "Digital White Area" Proposal Urged by
the SBCA Is Contrary to The Public Interest**

In its Comments (at pp. 2 and 14-15), the Satellite Broadcasting & Communications Association ("SBCA") advocates a radical change in law to permit DBS firms to retransmit the digital signals of distant television stations into so-called "digital white areas." This SBCA proposal, if implemented, would have ruinous consequences for free, local, over-the-air broadcasting in many markets and profoundly harmful impacts on consumers.

^{1/} NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations.

^{2/} Notice of Inquiry in MB Docket No. 04-227 (released June 17, 2004).

In essence, the SBCA asks for a brand-new compulsory license to permit DBS firms to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the *same programming* over the air from their local station's analog signal and (b) in the overwhelming majority of cases, EchoStar and DirecTV already deliver the *same programming* via what SBCA describes as "a 100 percent, crystal-clear digital audio and video signal" retransmitted from the local station's analog broadcasts.

The simple greed behind this proposal is clear, and the tactic is familiar. In the 1990s, the DBS industry sought to offer network broadcast programming "on the cheap" by delivering the analog broadcasts of New York and Los Angeles stations nationwide -- completely bypassing the network/affiliate system that Congress and the Commission have worked so hard to foster. (Indeed, in the 1990's satellite companies urged total abolition of the "unserved household" restriction -- to permit *universal* distribution of New York and Los Angeles stations in return for payment of a "surcharge.") Congress wisely rejected those proposals, instead insisting on localism and on marketplace solutions. The result has been a win for DBS companies, broadcasters, and viewers alike: the DBS firms found technical solutions to enable them to offer *local-to-local* broadcast programming to the overwhelming majority of U.S. television viewers -- and, almost certainly, soon to all of them.

The SBCA's current proposal is equally self-serving. DBS companies would enjoy a tremendous financial benefit from being able -- again "on the cheap" -- to deliver the digital broadcasts of New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering *local* digital broadcasts, they could use a single, inexpensive *national* feed to deliver digital programming of a particular network around

the country. Although this gambit would cost the DBS firms virtually nothing, they would gain enormously, both in additional customers (at \$40, \$50 or more per month) and in selling additional network packages (at \$6 per month) to both old and new customers.

While the “distant digital” proposal would be a tremendous windfall for DBS, it would be a disaster for the public and for broadcasters. As discussed below, the supposed “factual” premise for this proposal -- that the broadcast television industry has not been diligent in pushing the digital transition -- is false. Moreover, this gift to the DBS industry would come at a crippling cost to Congress’ and the Commission’s public policy objectives.

A. The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting -- With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households

Contrary to the satellite industry’s ill-informed accusations, the television industry has worked tirelessly to implement the transition to digital broadcasting. Broadcasters have expended billions of dollars and millions of person-hours to build – and to go on-air with -- digital television (“DTV”) facilities in 207 markets that serve 99.7% of all U.S. TV households.^{3/} Today, 88% of U.S. television households have access to *at least five* free, over-the-air digital television signals.^{4/} Nationwide, 1,292 stations are on the air in digital in 207 markets.^{5/}

^{3/} National Association of Broadcasters, *DTV Stations in Operation*, <http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp> (August 2004) ("*DTV Stations in Operation*").

^{4/} *Id.*; see also Mark R. Fratrik, Ph.D, *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for the Association for Maximum Service Television, Inc.) (“MSTV Study”).

^{5/} *DTV Stations in Operation*, *supra*.

Those who do not understand the digital transition sometimes erroneously claim that DTV stations operating with Special Temporary Authority ("STA's") broadcast with very low power. Many stations, particularly those outside the largest stations in the largest markets, are "DTV maximizers," *i.e.*, are maximizing their power to greatly *exceed* their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70% or more of their analog service areas. Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing the very small number of households nationwide that cannot receive local signals, and the digital transition -- if not disrupted by an ill-conceived "distant digital" regime -- will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that, even then, on-air DTV facilities were already serving 92.7% of the population served by the corresponding analog stations.^{6/} The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking as broadcasters work hard, at great expense, to expand the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television ("HDTV") programming to entice viewers to join the digital television transition and purchase DTV sets to display dazzling HDTV programs and the multiple offerings of DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as many high-profile specials

^{6/} MSTV Study, *supra*, at i.

and sporting events, and the Fox network will soon begin offering substantial amounts of HD as well.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. Indeed, EchoStar's General Counsel, David Moskowitz, admitted as much in testimony before the Judiciary Committee in February: "I agree with you completely [that broadcasters can't be blamed for decisions by consumers not to invest in digital sets]. I'm not saying the NAB or the broadcasters are at fault."^{7/}

Adoption of a new compulsory license for "digital white areas" allowing satellite carriers to deliver distant digital (or HD) signals to so-called "digital white areas" would set the stage for replication of the consumer nightmare that occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

During that transition, Congress and the Commission painfully experienced mountains of angry letters, emails, and phone messages from viewers accustomed to receiving all of their TV programming (including network stations) by satellite when told that they must switch to a hybrid system in which satellite reception was combined with an off-air antenna or cable service. The consequences of the "distant digital" proposal is therefore clear: after EchoStar has seduced customers with a distant digital signal, local broadcast stations would get stuck with the considerable costs and aggravation of trying to reclaim those angry viewers with the need to change their reception setup once local digital service was available. SBCA knows all of this, and it fully understands the implication: the "distant digital" plan would *not* encourage a smooth digital transition, and would *not* encourage stations to invest in the digital rollout. Rather, the

^{7/} Testimony of David Moskowitz before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee (Feb. 24, 2004).

plan would simply facilitate EchoStar's ability to hook customers on (distant) satellite-delivered digital signals and keep them forever.^{8/}

EchoStar's past conduct leaves no doubt that it would retain digital distant-signal customers once it began serving them – regardless of the legality of doing so. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal analog distant-signal customers that, “when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers,” the key “EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz,” choose instead “to break Mr. Ergen’s promise to the Court” that it would turn them off. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d at 1246, ¶ 46.

B. The New Digital Distant Compulsory License Proposed by the SBCA Is Unnecessary and Would Do Lasting Damage to Localism

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a “lifeline” to satellite subscribers that had no other options for viewing network programming.^{9/} The SBCA proposal would do exactly the opposite: Congress would override normal copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most

^{8/} In his oral testimony in February before a subcommittee of the House Judiciary Committee, SBCA spokesman (and EchoStar General Counsel) David Moskowitz said that once DBS firms begin delivering a distant digital signal to a household, they should *never* have to turn off that signal. Far from encouraging stations to expand their digital service areas, this naked “land grab” would have the opposite effect: no matter what they did, stations would have forever lost many of their local customers to a distant signal.

^{9/} E.g., SHVIA Conference Report, 145 Cong. Rec. H11792 (“the specific goal of the 119 license, which is to allow for a *life-line network television service to those homes beyond the reach of their local television stations*, must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the ‘unserved household’ limitation that has been in the license since its inception.” *Id.* (emphasis added).

cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package.

The suggestion that Congress needs to step in to offer a “lifeline” under these circumstances is both fatuous and dangerous.^{10/} For example, if a station, through no fault of its own (*e.g.*, because of a local zoning obstacle) has been unable to go on-air with a digital signal, *every household in that station’s market* would be considered “unserved” -- and therefore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates’ digital broadcasts. In these markets, the SBCA would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it.^{11/} And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters in many markets would be devastating.^{12/} This adverse impact would, no doubt, be exacerbated by EchoStar which, based upon its past misdeeds in its retransmission of distant analog signals,

^{10/} In the guise of a letter seeking advice about how to fill out a Copyright Office form, EchoStar sought last year to obtain from the Copyright Office a statement that the Copyright Act *as now in force* already recognizes the “distant digital” concept. *See* Letter from David Goodfriend, EchoStar Communications Corp. to David O. Carson, General Counsel, Copyright Office (June 18, 2003). The Office swiftly, and properly, rebuffed that back-door effort. Letter from William J. Roberts to David Goodfriend (Aug. 19, 2003).

^{11/} In other markets, while stations have gone on-air with their digital signals, their coverage area is temporarily reduced for reasons entirely beyond their control -- such as the destruction by terrorists of the World Trade Center and its broadcasting facilities.

^{12/} Of course, the tiny number of *genuinely unserved* households (*e.g.*, those unable to receive Grade B intensity analog signals over the air) can receive either an analog or a digital signal from a distant affiliate of the same network. *See* Letter from William J. Roberts, U.S. Copyright Office, to David Goodfriend (Aug. 19, 2003).

would steadfastly refuse to cease delivery of digital distant signals, even if it “promised” to do so, and even if the law squarely required it do to so.

Granting this enormous government subsidy to the DBS industry, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences), would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a *local* phenomenon, and the right way to deliver local stations is on a local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have -- despite their gloomy predictions -- found a way to do so for analog broadcasts. Rewriting the laws to give DBS a cheap, short-term, government-mandated “fix” will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress and the Commission wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and should do the same now.^{13/}

The SBCA proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If DBS could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, it would have a huge (and wholly unjustifiable) advantage over its cable competitors, which are virtually always barred by the FCC’s network non-duplication rules from providing such signals. *See* 47 C.F.R. §§ 76.92-76.97 (1996).

^{13/} When analog broadcasting ceases several years from now, there may – but may not – be a need for a distant-signal compulsory license. If the DBS firms are then providing local-to-local broadcasts of local TV stations in a digital (or HD) format, for example, there may be no need for a distant-signal license at all, or a need only for an extremely limited license.

II. DBS Claims of Capacity Constraints Are Highly Suspect; Many Options Exist For Expanding The Ability To Deliver Local Signals, Including Local Digital and HD Signals

In its Comments, the SBCA suggests (at 15-16) that purported capacity constraints should lead the Commission to "go easy" on applying the statutorily-mandated "carry one, carry all" principle to carriage of the digital signals (including high-definition signals) of local television stations. In fact, history shows that DBS claims about capacity constraints have been consistently and greatly exaggerated.

For example, even as DirecTV was doubling its "compression ratio" between 1998 and 2001—enabling it to carry twice as many channels in the same amount of spectrum—it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology.^{14/} Far from hitting any brick walls, of course, DirecTV has now found ways to offer local-to-local service in all 210 television markets as early as 2006, and no later than 2008.^{15/}

EchoStar has been similarly pessimistic -- and just as wrong -- in its predictions about supposed capacity limits. In December 2001, for example, EchoStar stated it could serve only 36

^{14/} See, e.g., Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

^{15/} In the Commission proceeding concerning News Corporation's acquisition of DirecTV stock, News Corporation committed that as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs*." *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, ¶ 332, MB Docket No. 03-124 (released Jan. 14, 2004) (emphasis added).

markets by itself.^{16/} By February 2002, EchoStar revised that figure upward to 50 markets.^{17/} By May 2003, EchoStar said that it could serve 106 markets by itself during 2003.^{18/} And today (August 2004), EchoStar serves no fewer than 144 markets^{19/} -- with no sign that its expansion plans have come to an end.

Consistent with the DBS industry's past -- unwarranted -- pessimism, the SBCA comments are premised on the assumption that the DBS firms have no hope of significantly expanding their capacity. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- spectrum-sharing between DirecTV and EchoStar;^{20/}
- use of Ka-band as well as Ku-band spectrum (already being implemented by DirecTV, as discussed above);
- higher-order modulation and coding;

^{16/} Joint Engineering Statement in Support of Transfer of Control Application, *In Re Application of EchoStar Communications Corp.*, CS Docket No. 01-348 (filed December 3, 2001): EchoStar and DirecTV say that each "typically offers only a few local broadcast stations to a small number of metropolitan areas [36 for EchoStar and 41 for DirecTV]."

^{17/} Opposition to Petitions to Deny and Reply Comments, *In Re Application of EchoStar Communications Corp.*, CS Docket No. 01-348 (filed Feb. 25, 2002): "EchoStar will have the capability of offering local channel service in [only] approximately 50 DMAs from its spot beam satellite[s] . . ."

^{18/} EchoStar Press Release, *EchoStar Dish Network Satellite TV Names 42 New Local Channel Markets for 2003* (released May 1, 2003): "[EchoStar] announced today 42 new designated market areas where it plans to launch local TV channels . . . This will bring the total number of markets DISH Network serves with local channels to 106 by year end. DISH Network is also announcing that it plans to offer local channels via satellite in more cities across the nation by end of 2004."

^{19/} EchoStar Press Release, *DISH Network Satellite Television Brings Local Channels To Norfolk-Portsmouth-Newport, Va.* (Aug. 12, 2004) ("DISH Network offers local channels in 144 markets and their metro areas, in 50 states and in the District of Columbia.").

^{20/} Just this month, EchoStar CEO Charlie Ergen "again indicated he is open to working with DirecTV on sharing satellite capacity in order to deliver local high-definition programming," as long as certain technical issues (such as encryption methods) are resolved. *Satellite Business News* (Aug. 11, 2004), at 2.

- closer spacing of Ku-band satellites;
- satellite dishes pointed at multiple orbital slots;
- use of Ku-band spectrum delivering from terrestrial towers (rights that an EchoStar affiliate has recently purchased in a Commission auction);
- use of a second dish to obtain all local stations;^{21/}
- improved signal compression techniques, such as MPEG-4.^{22/} and
- acquiring capacity on foreign satellites.²³

In its July 2004 Comments, for example, DirecTV says that just in the preceding two months, it had announced plans to launch satellites that "will support further increases in the amount of local-to-local and high definition programming currently offered." DirecTV Comments at 3. One of the new satellites will, for the first time on a commercial payload, "combine DBS and Ka-band payloads" (*id.*) -- a method long advocated by satellite engineers as a way to massively increase capacity to carry local stations. Another example is the Commission's approval of DirecTV's request to move one of its satellites to a Canadian slot from which it will be able to offer local channels in 24 additional markets. EchoStar has announced that it too is looking into this option.²⁴

The satellite industry plainly has every incentive to invest in the technology needed to offer local stations (including local digital and HD signals), since local-to-local has been the key to DBS' continuing triumphant success in the marketplace against cable. *See* DirecTV

^{21/} The SHVIA permits a satellite carrier to offer *all* local stations via a second dish, but not to split local channels into a "favored" group (available with one dish) and a "disfavored" group (available only with a second dish).

^{22/} EchoStar told securities analysts in a conference call this month that it plans to include chips with advanced (MPEG-4) compression technology in its set-top boxes starting in 2005.

²³ *Broadcasting & Cable*, 08/23/04 at 17.

²⁴ **Id.**

Comments at 28 ("DirecTV has seen its subscribership jump dramatically in markets where it offers local-to-local service."); Peter Grant and Chris Jones, *Deep Dish: Satellite TV Grows*, Las Vegas Review-Journal (Aug. 5, 2004) ("Today, satellite is trouncing cable in the battle for subscribers in rural and urban areas alike, badly damaging the cable industry's reputation as a growth sector on Wall Street."). Powered by their expanding offerings of local-to-local, both DirecTV and EchoStar continue to add new subscribers by the millions each year, while cable is actually *losing* subscribers in large numbers. Peter Grant and Chris Jones, *Deep Dish: Satellite TV Grows, supra* ("Dish Network and DirecTV . . . are on track to add more than 2 million subscribers this year," while "[t]he [cable] industry has lost some 900,000 U.S. subscribers over the past two years").

III. The Commission Should Not Bar Offers to "Bundle" Retransmission Consent with Carriage of Nonbroadcast Channels

In its Comments (at 5-8), EchoStar urges the Commission to bar a sound and sensible type of retransmission consent deal, in which a station agrees to permit carriage of its over-the-air signal in return for a cable system's (or satellite carrier's) agreement to carry certain nonbroadcast channels, such as a local news channel. There is no reason for the Commission to revise its carefully-considered determination, in the 2000 "good faith" proceeding, that proposals to bundle retransmission consent and carriage of nonbroadcast channels are presumptively permissible. *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999 -- Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, ¶ 58 (2000). In most instances, of course, broadcasters are fully prepared to offer both a bundled proposal and a cash alternative. That cable systems and satellite carriers often choose the bundling option simply reflects that "in kind" transactions -- such as agreements to carry additional channels -- are often mutually beneficial, because they provide

substantial benefits to local stations at relatively modest out-of-pocket costs to MVPDs. These transactions are no more sinister than any other type of deal in which parties decide to exchange in-kind (or barter) consideration, rather than cash.

IV. SBCA's Attack on the Commission's ILLR Model and on the Grade B Intensity Standard is Without Merit

SBCA's criticism of the Commission's computer model for predicting the ability to receive broadcast television stations over the air -- the Individual Location Longley-Rice ("ILLR") model as being "developed in the 1950s" (SBCA Comments at 18) is, of course, inaccurate: the Commission first announced the ILLR model in February 1999, not in the 1950s.

To the extent that the SBCA is suggesting that the Grade B intensity standard is a creature of the 1950s, that too is wrong. For the ever-shrinking number of markets in which the DBS firms do not offer local-to-local (which will encompass no more than 8% of U.S. television households by the end of 2004 for DirecTV), the Grade B intensity standard continues to be the logical method for predicting which households are unable to receive analog signals of local stations over the air.

In 1998, the courts found that the satellite industry had broken the law by signing up millions of subscribers using an illegal method. The satellite industry then demanded that the Commission alter (in the satellite industry's favor) what the DBS firms characterized as an "antiquated," "1950's-era" Grade B standard.

The Commission carefully considered the engineering data and other evidence presented by the satellite industry, but concluded that, in fact, there was no basis for changing the Grade B standard. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, ¶¶ 32-43, Dkt. No. 98-201 (released Feb. 2, 1999). Although the Grade B standard was originally established in the 1950's, the Commission pointed out that it

had repeatedly re-evaluated the standard during the intervening decades and found it to be still sound. *Id.*, ¶ 42. As the Commission observed, many of the changes that have occurred since the 1950's have made it *easier* to obtain a picture of acceptable quality with the same strength signal: for example, the “low cost noisy tubes and . . . components” of the 1950s have been replaced by “modern solid state components that produce lower set noise.” *Id.*, ¶ 41. Overall, the FCC found that the “environmental and technical changes that have taken place” since the Grade B standard was first established have moved “in opposite directions and tend to cancel each other out.” *Id.*, ¶ 42.

Despite this exhaustive review by the Commission in 1998 and 1999, when Congress enacted the SHVIA, it directed the Commission to conduct yet *another* proceeding to evaluate whether Grade B intensity is an appropriate standard. After carefully evaluating the submissions by all interested parties, including engineering data submitted by the satellite industry, the Commission *again* recommended that the Grade B standard remain unchanged in virtually all respects. *In Re Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, ET Dkt. No. 00-90 (released Nov. 29, 2000).

Similarly, the FCC's ILLR predictive model, first announced in 1999, grew out of years of Commission experience with the Longley-Rice model in other contexts. *In Re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, at ¶¶ 61-88. In response to Congress' directive in the SHVIA, and after reviewing all of the satellite industry's submissions, the Commission made further refinements to the ILLR model in May 2000 and reaffirmed that ILLR is an accurate and reliable model. *In Re Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual*

Locations, ET Docket No. 00-11 (released May 26, 2000). In doing so, the Commission considered how ILLR predictions fared when compared to actual signal intensity measurements at the same location, and found that in many cases ILLR actually *underpredicts* the actual signal strength available at particular households -- precisely the opposite of the satellite industry's claims. *Id.*

V. Any Application of "Significantly-Viewed" To DBS Must Include Appropriate Safeguards

SBCA urges that DBS firms be allowed to carry television stations in areas in which they are significantly viewed. (SBCA Comments at 3.) In the spirit of accommodation, NAB does not oppose a carefully-tailored amendment extending DBS the ability to retransmit "significantly-viewed" television stations, provided: 1) it is consistent with the principles of localism that underlie the entire Satellite Home Viewer Improvement Act; and 2) to the extent possible, provides the satellite industry with the same rights and limitations the cable industry now enjoys. Given the years of violations of existing copyright law and abuse of FCC processes by EchoStar, any such amendment must be airtight -- and create the strongest possible incentives to comply with the law -- to reduce the risk that a new exception will become the basis for a new round of lawbreaking.

In particular, any amendment to allow DBS firms to carry "significantly-viewed" stations should implement the following principles:

1. Strict enforcement provisions to protect against abuse.

Any “significantly-viewed” amendment should guard against a new wave of lawbreaking by creating strict, objective, verifiable, and enforceable rules about when satellite carriers can deliver out-of-market signals into “significantly viewed” areas. In particular:

- The FCC, and not any DBS company, should make the determination about whether a particular TV station is “significantly viewed” in a particular community.
- To enable monitoring compliance, DBS firms should indicate separately which subscribers are being served under the “significantly viewed” provision in their monthly reports to networks listing new local-to-local subscribers.
- Penalties for rule violations should be swift, certain, and severe.

2. Protection against harm to localism Delivery of out-of-market stations to a household should be a *supplement* to the DBS firms’ delivery of a viewers’ local stations, not a *substitute* for true local-to-local. (This is always true for cable, which always offers local stations.) For example, delivery by DBS firms of New York City stations to “significantly viewed” areas in the Hartford/New Haven DMA would be *in addition to* DirecTV’s and EchoStar’s delivery of local Hartford/New Haven stations.

It would be extraordinarily damaging if the DBS firms could deliver an out-of-market station into a market in which they do *not* offer local-to-local service (or to viewers who do not subscribe to local-to-local). For example, if out-of-market stations could be imported into DMAs in which local-to-local is not offered, subscribers in the latter markets would see an *out-of-town* station on their DBS lineup, but would not see their own local stations. Particularly because the DMAs in which local-to-local is not yet available are generally small markets, the

economic health, and even the viability, of free, over-the-air local stations could be threatened as out-of-town stations siphoned off their local viewers.

For the same reasons, delivery of an out-of-market station in *digital* (or high-definition) format into a market in which the local stations are available only in an analog form would be very damaging to the local stations in the “invaded” market. Similarly, allowing importation of signals into non-local-to-local markets (or allowing importation of digital signals into analog-only local-to-local markets) would damage the incentives for the DBS firms to continue expanding the number of markets they serve with local-to-local.

To ensure that expanding the DBS license to include carriage of “significantly viewed” stations does not have these harmful effects, therefore, any proposal to do so must permit delivery of stations into “significantly-viewed” areas only if the satellite carrier is already providing local-to-local service in those areas, and only to households that receive that service. When the DBS firm carries the “significantly-viewed” station in a digital format, it should be allowed to import the station into another market into the relevant community only if the DBS firm is already offering the local stations in digital, with the same bandwidth as the imported station.

Finally, broadcasters’ carriage negotiations with satellite carriers should be placed on the same footing as negotiations with cable operators, once both cable and DBS have the benefit of delivering stations in “significantly viewed” communities. In appropriate cases, broadcasters should be permitted to make their elections between retransmission consent and mandatory carriage on a county-by-county, rather than DMA-wide, basis.

VI. EchoStar's "Two Dish" Major Abuse Of Local-To-Local Must Be Remedied

In crafting the SHVIA, Congress knew that if a DBS firm were permitted to select only some -- but not all -- local stations for retransmission, the stations left off the service would have little chance of reaching viewers who obtain their TV service from the satellite company. In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the SHVIA specifies that if a satellite carrier chooses to use the local-to-local license to carry signals in a particular market, it must carry *all* qualified local stations. 47 U.S.C. § 338(a)(1). That requirement has been upheld against constitutional attack by EchoStar, DirecTV, and their trade association. *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). The purpose of the "carry one, carry all" principle is, of course, to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market.

Since late 2001, EchoStar has egregiously violated the requirement that it carry all stations in a nondiscriminatory manner: in many markets, EchoStar forces consumers to acquire a second satellite dish to receive some -- but not all -- local stations. Here in the Washington, D.C. area, for example, EchoStar enables its customers to see the ABC, CBS, Fox, and NBC stations (and a handful of other local stations) with a single satellite dish, pointed at EchoStar's main satellites. See EchoStar web site, www.dishnetwork.com/content/programming/locals/index.shtml. On the other hand, viewers wishing to see Channel 14 (Univision), Channel 32 (WHUT -- PBS), Channel 53 (WNVT -- International), Channel 56 (WNVC -- International),

or WJAL (Channel 68 --Independent) are forced to obtain a second satellite dish aimed at a satellite far over the Atlantic. *Id.* In this and other markets, EchoStar targets public television, Hispanic, and other foreign-language stations for this discrimination.

Because few viewers will go to the time and trouble of obtaining a second dish -- *e.g.*, a long wait at home for an installer -- the net result is that only a tiny percentage of EchoStar subscribers can actually view all of their local stations. To date, the Commission's measures to address this egregious form of discrimination have been ineffective.²⁵ EchoStar has, on many occasions, violated even the minimum requirements imposed by the Commission by failing to adequately inform subscribers about the need for a second dish, actively discouraging subscribers from obtaining a second dish, falsely telling them they would have to pay for the second dish, or falsely stating that they could not have a second dish installed at the time of their original installation.²⁶

The Commission indicated in January 2004 that it planned to take action soon to address EchoStar's two-dish practices,²⁷ but it has not done so. The Commission should ensure that

^{25/} Declaratory Ruling & Order, *In re National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Dkt. No. CSR-5865-Z (Media Bureau Apr. 4, 2002). The Commission has to date required only that EchoStar fully disclose its discriminatory treatment and that it pay for the installation of the second dish. Not surprisingly, these requirements have not solved the fundamental problem that acquiring a second dish requires a major expenditure of time and effort on the part of the subscriber, with the result that -- just as EchoStar hopes -- few viewers ever actually acquire a second dish.

²⁶ *In re University Broadcasting, Inc. v. EchoStar Communications Corp.*, Mem. Op. & Order, Dkt. No. CSR 6007-M (Feb. 20, 2003); *In Re Entravision Holdings, LLC*, Mem. Order & Op., Dkt. No. CSC-389 (April 15, 2002); *In Re Tri-State Christian, Inc.*, Mem. Op. & Order, Dkt. No. CSR-5751 (Feb. 5, 2004).

^{27/} See Separate Statement of Chairman Michael K. Powell, at 2 n.3, *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03-124 (released Jan. 14, 2004).

EchoStar can no longer thumb its nose at Congress' unmistakable directive that DBS firms that local-to-local means carriage of *all* local stations, without relegating many of the stations to an inaccessible satellite Siberia.

Conclusion

For the reasons discussed above, vigorous competition in the video marketplace will be enhanced by fostering *local-to-local*, rather than distant, retransmissions of over-the-air television stations. Local-to-local transmissions of analog signals have been a tremendous boon to both the satellite industry and consumers, and local-to-local retransmissions of digital signals will have the same beneficial effects. The Commission should decline to endorse the short-sighted proposals by SBCA and EchoStar, such as their distant-digital scheme, that would sabotage the ongoing local-to-local rollout and impede effective, pro-consumer competition between satellite and cable, and it should ensure that EchoStar's two-dish ploy be halted.

Respectfully submitted,

A handwritten signature in black ink, reading "Benjamin F.P. Ivins". The signature is written in a cursive, flowing style.

Marsha J. MacBride
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
Tel: (202) 429-5430

August 25, 2004